CONSTITUTIONAL REVISION COMMISSION
ANALYSIS OF PROPOSAL NO. 51

I. SUMMARY

Proposal 51 would add a new section to Article X of the Florida Constitution to read:

> Rights of electricity customers. Effective January 1, 2021, every person, business, association of persons or businesses, nonprofit organization, state agency, political subdivision of this state, or any other entity in this state, referred to in this section as "electricity customers", has the right to choose the provider of its electricity service, including, but not limited to, selecting from multiple providers in a competitive electricity market, or by producing electricity for themselves or in association with others, and may not be forced to purchase electricity service from one provider. This section may not be construed as limiting the right of electricity customers to sell, trade, or otherwise dispose of electricity.

The proposal would fundamentally alter Florida's vertically-integrated electric industry that the Florida Public Service Commission ("FPSC") has overseen for over 40 years by giving consumers an unfettered constitutional right to pick and choose their electricity provider without regard to whether that choice would jeopardize the reliability of Florida's Electric Grid or cause electricity prices to increase for other customers.

II. SUBSTANTIVE ANALYSIS

A. PRESENT SITUATION

Electricity is a Unique and Essential Service

Unlike many other services and commodities, electricity is a basic necessity that is essential to modern day life. The provision of electricity also can be hazardous. Faulty wiring and power lines that are close to buildings and trees can do serious harm to people and property. Without safe, affordable, and reliable electric service, the quality of life of all Floridians would be threatened. Because the provision of electricity impacts such vital public interests, the Florida Legislature has given the FPSC broad, and in some cases "exclusive and superior", powers to ensure that electricity is provided in a safe, efficient, and reasonably-priced manner.[1]

Florida's Current Electric System Model

There are three distinct components to the provision of electricity services: (1) generation (the actual production of electricity); (2) transmission (the transportation of large volumes of electricity at high voltage between the generating plant and the distribution system); and (3) distribution (the delivery of electricity to retail customers in a usable, low voltage form). Over the past century, Florida's electric industry has developed as a vertically-integrated industry, with electric utilities

[1] *See* § 366.04(1), Fla. Stat.

packaging the generation, transmission, and distribution of electricity and providing it to retail consumers in a single rate.

The FPSC's Division of Policy Analysis has concluded that integrating generation, transmission, and distribution in Florida has

> resulted in an efficient interaction between the three activities where economies of scale and scope have been realized. Economies of scale take place because it is generally more economical to build larger power plants than smaller ones . . . . Also, economies of scope take place because the overlapping functions common to generation/transmission and transmission/distribution can permit the utilization of a more efficient workforce, in both size and function resulting in cost savings to consumers. In other words, the vertical integration of the industry has achieved efficiencies that have historically proven to be more cost-effective than separating the provision of each service.[2]

Currently, integrated electricity services are provided to Florida consumers on a retail basis by 55 electric utilities, including 16 not-for-profit electric cooperatives, 5 investor-owned utilities ("IOUs"), and 34 municipal electric utilities.[3]

Regulatory Framework in Florida

Florida's unique peninsular geography makes electric system reliability of paramount importance to consumers and businesses. As a peninsula, the state is vulnerable to heat waves, hurricanes, and tropical storms which can interrupt the supply of electricity. Furthermore, Florida's unique peninsular geography only allows the state to be tied to other utilities in one direction—to the north. As a result, "interties with the rest of the nation are relatively few and Peninsular Florida can only import, at a maximum, less than 10 percent of its total peak demand (summer 2001) over the high-voltage transmission system."[4] These constraints limit the state's ability to rely on out-of-state electricity sources in the event of service interruptions.

Florida also is unique in that it has a large population of senior citizens[5] who are dependent on constant reliable supply of electricity for their healthcare, food, and other basic needs. Many of Florida's senior citizens are on fixed incomes and thus rely on electricity prices to be affordable

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[2]FPSC Division of Policy Analysis & Intergovernmental Liaison, Regional Transmission Organizations (RTOs), Policy Analysis Briefing Paper: The Viability of an RTO in Florida at 1-2 (Sept. 2000) (hereinafter "RTO Briefing Paper"), http://www.floridapsc.com/Files/PDF/Publications/Reports/Electricgas/jburton-2000-rto.pdf.

[3]*See* FPSC, 2017 Facts & Figures of the Florida Utility Industry, at 1 (hereinafter "FPSC 2017 Facts"), http://www.floridapsc.com/Files/PDF/Publications/Reports/General/Factsandfigures/March%202017.pdf (Although Florida has 18 total electric cooperatives, two do not provide retail service.)

[4]*In re: Review of Fla. Power Corp.'s earnings*, FPSC Order No. PSC-01-2489-FOF-EI, at 17 (FPSC Dec. 20, 2001), http://www.floridapsc.com/library/filings/2001/15875-2001/15875-2001.PDF; *see also* RTO Briefing Paper, *supra* note 2.

[5]In Florida, the state's population aged 65 or older is 19.1%—the highest in the nation. Laura Kent, Pew Research Center, Where do the oldest Americans live?, http://www.pewresearch.org/fact-tank/2015/07/09/where-do-the-oldest-americans-live/.

and stable.[6] The state also has a large population of low-income citizens, who similarly depend upon the availability of affordable electricity.[7]

Given these unique geographic and demographic characteristics, the Florida Legislature has established a model whereby Florida's electric system is comprehensively regulated by the FPSC to ensure that electricity services are safe and reliable, and that electricity is provided at the lowest possible cost.

Safety and Reliability

The Legislature has given the FPSC broad and exclusive powers to prescribe and enforce safety standards for the transmission and distribution facilities of all IOUs, municipal electric utilities, and electric cooperatives.[8] The so-called "Grid Bill"[9] also gives the FPSC broad powers to protect the integrity and reliability of Florida's overall electric system. The FPSC's jurisdiction over system reliability includes establishing mechanisms for sharing of energy reserves of all electric utilities, and instituting conservation and reliability measures within a coordinated grid. To assist the FPSC in its responsibility to ensure the reliability of Florida's electric system, each generating electric utility in Florida is required to file ten-year site plans with the FPSC at least every two years. Those plans identify the utility's forecasts of system load, demand-side conservation achievements, and plans for generation and transmission additions required to serve the electricity requirements of its customers. The FPSC reviews those plans and issues a report on their suitability for electric system planning.[10]

To further ensure the safety and reliability of Florida's Electric Grid and to avoid uneconomic duplication of facilities, the Legislature encourages utilities to enter into territorial agreements which establish geographic service areas within which the incumbent utility would have the exclusive right, along with the corresponding obligation, to serve all customers.[11] This exclusive service area concept ensures that all consumers in the state, regardless of location or socio-economic background, will have an experienced utility to provide them with electricity services.

Reasonable Rates

The FPSC regulates the retail rates and cost of services of five IOUs.[12] The retail rates charged by municipal electric utilities are set by municipal officials elected by the customers they serve. The rates for not-for-profit electric cooperatives are set by a board of trustees elected by all cooperative members pursuant to Chapter 425, Florida Statutes. The FPSC also has rate structure jurisdiction

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[6]*See, e.g.*, Nat'l Council on Aging, Economic Security for Seniors Facts, https://www.ncoa.org/news/resources-for-reporters/get-the-facts/economic-security-facts/ (discussing economic status of seniors in United States).
[7]*See* U.S. Census Bureau, Quick Facts Florida, https://www.census.gov/quickfacts/FL (noting that 14.7% of Floridians live in poverty).
[8]§ 366.04(6), Fla. Stat.
[9]*See* §§ 366.04(2)(c), 366.05(8), Fla. Stat. (vesting the FPSC with jurisdiction over the planning, development, and maintenance of a coordinated Electric Grid throughout the State of Florida).
[10]*See* § 186.801, Fla. Stat.
[11]*See* § 366.04(2)(d), Fla. Stat. ("In the exercise of its jurisdiction, the commission shall have power over electric utilities . . . [t]o approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction.").
[12]*See* §§ 366.04, 366.05, 366.06, 366.07, Fla. Stat.; FPSC 2017 Facts, *supra* note 3, at 1.

over all electric utilities (IOUs, municipal electric utilities, and cooperatives) in order to ensure that their rates are not unduly discriminatory and all customer classes (residential, commercial, and industrial) are paying their fair share of the utility's costs.[13]

Operational Results under Florida's Current Model

Under Florida's current regulatory structure, the retail price of electricity is below the national average.[14] Recent data compiled by the U.S. Department of Energy's Information Administration ("EIA") shows that Florida's residential rates are the lowest of the ten largest states in the country.[15]

In November 2017, the FPSC's Review of the 2017 Ten-Year Site Plans shows that the current supply of electricity in Florida is reliable, even during peak demand periods or unplanned plant outages.[16] Moreover, either by statute or the FPSC's approval of territorial agreements, all consumers in the state are assured electricity service regardless of their location or socio-economic status. [17]

Regulatory Framework in Other States

The majority of states still follow the vertically integrated model that is currently used here in Florida.[18] In those states that have experimented with restructuring their electricity markets, those efforts have typically occurred in states where electricity prices were disproportionately high *and* which had access to power supply sources from other states.[19] Neither of those dynamics are present in Florida. As noted above, Florida's residential rates are below the national average[20] and are the lowest of the ten largest states in the country.[21] Moreover, Florida's peninsular geography constrains interties with other states and has "resulted in an interstate interconnection system that has limited the state's competitive generation options (i.e., power sales to and power purchases from out-of-state utilities)."[22]

In reviewing electric utility restructuring in other states the FPSC has observed that:

> In Florida, as with the rest of the nation, industrial and large commercial customers have been the most vocal advocates of electric restructuring. These customers

[13]*See* § 366.04(2)(b), Fla. Stat.
[14]FPSC 2017 Facts, *supra* note 3, at 6.
[15]*See* Appendix, Comparison of Residential Electrical Prices for 10 Largest States in 2016, Extracted from the EIA Average Price by State by Provider Chart (EIA-961).
[16]*See* FPSC Review of the 2017 Ten-Year Site Plans of Florida's Electric Utilities at 5 (Nov. 2017), http://www.floridapsc.com/Files/PDF/Utilities/Electricgas/TenYearSitePlans/2017/Review.pdf (finding that, based on the review of the ten-year site plans, the projections of load growth are reasonable).
[17]*See, e.g.*, § 366.03, Fla. Stat.
[18]*See* Institute for Local Self-Reliance, Status of Electricity Market, https://ilsr.org/wp-content/uploads/2016/07/status-of-state-electricity-market.jpg (identifying as source 2010 data from EIA).
[19]Severin Borenstein & James Bushnell, Energy Institute at Haas, The U.S. Electricity Industry after 20 Years of Restructuring at 13 (Revised May 2015), https://ei.haas.berkeley.edu/research/papers/WP252.pdf.
[20]*See* FPSC 2017 Facts, *supra* note 3, at 6.
[21]*See* Appendix.
[22]RTO Briefing Paper, *supra* note 2, at 25.

> appear to have the most to gain from restructuring, since their size and business experience give them the ability to negotiate for low-cost generation or install self-service generation.[23]

The FPSC went on to warn that "[s]mall-use residential and commercial customers are less likely to have meaningful alternative generation supply choices in a competitive market and may be left paying higher costs."[24] Although the FPSC issued this warning in October of 1997, its concern remains valid today. In 2015, the American Public Power Association ("APPA") issued a report based upon EIA data comparing retail electric prices in regulated states to prices in unregulated states. After examining retail rates and other relevant data points from 1997 to 2015, APPA concluded that "increases in retail electricity prices were higher in states with deregulated [electric] markets than in regulated states."[25]

Consumers have also experienced price volatility and misleading marketing tactics when electricity markets are restructured. For example, the Connecticut Attorney General has noted that many deregulated electricity providers "offer variable rate products that are marketed with an attractive and competitive teaser rate that is quickly replaced by significant charges without notice."[26]

B. EFFECT OF PROPOSED CHANGES

Proposal 51 would dismantle Florida's electric system model and give all consumers an unrestricted constitutional right to pick and choose their "provider" of "electricity service" in a "competitive electricity market" without regard to whether that choice of "provider" would diminish the reliability of Florida's Electric Grid or cause electricity prices to increase for other customers. Several of the operative terms in the proposal are not defined thus leaving uncertainty as to what effect the proposed constitutional change would have. For example:

- The proposal would create a constitutional right for any consumer to choose its "provider" of "electric service", but is silent as to who is, or who may become, a "provider".

- The proposal is silent whether the "provider" would be subject to governmental oversight to protect consumers from confusing or predatory marketing practices.

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[23] *See* FPSC Electric Restructuring at 29, http://www.floridapsc.com/Publications/ElectricRestructuringDetails#29.

[24] *Id*.

[25] APPA, Retail Electric Rates in Deregulated and Regulated States: 2015 Update, https://www.publicpower.org/periodical/article/us-retail-rates-fairly-flat-slightly-higher-deregulated-regions. The California electricity crisis offers a good example, as wholesale prices soared and consumers experienced the legendary brownouts of the early 2000s. *See* Borenstein & Bushell, *supra* note 19, at 9; *see also* Congress of the United States, Congressional Budget Office, Causes and Lessons of the California Electricity Crisis (Sept. 2001) (hereinafter "CBO Report"), https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/30xx/doc3062/californiaenergy.pdf.

[26] Conn. Att'y Gen., Consumer Advisory: Consumer Counsel, AG Warn Electric Supplier Customers to Check their Rates (Jan. 16, 2014), http://www.ct.gov/occ/lib/occ/1-16-14_oag_occ_electricsuppliers.pdf; *see also* Stephen Singer, *Electric Prices Jump For Customers Of Some Power Suppliers* (Jan. 16, 2014), http://connecticut.cbslocal.com/2014/01/16/electric-prices-jump-for-customers-of-some-power-suppliers/.

- The proposal does not define "electricity service" nor does it define "competitive electricity market", thus leaving it unclear whether the proposal is intended to simply allow a consumer to choose the generator of its electricity or to give a consumer the right to choose the generator, the transmitter, and the distributor of its electricity.

- The proposal specifically states that a person has a constitutional right to "not be forced to purchase electricity services from one provider", which would appear to do away with the exclusive service areas created by territorial agreements entered into by electric utilities and approved by the FPSC pursuant to the Grid Bill.

- The proposal says nothing about any of the competitive providers of electricity services having an obligation to serve, thus leaving the question open as to whether there may be some electricity customers in the state that would have no opportunity to purchase electricity.

- The proposal is completely silent as to who is responsible for improvements or repairs to Florida's Electric Grid, and whether the state would be able to compel such improvements or repairs.

Even with more definitive terms, the proposal still would radically alter the vertically integrated economic model for electric utilities and could expose Floridians to some of the unintended adverse consequences that have occurred in other states that have experimented with restructuring their electricity markets. Those risks include:

- **Potential price increases, particularly for residential customers**.[27] This risk could be particularly acute for Florida which has a disproportionally large percentage of residential customers and does not have an exceptionally large industrial base.[28] Consequently, if prices increased, residential consumers would likely bear the brunt of those increases.[29]

- **Price volatility.** In California, for example, restructuring was almost immediately met with extreme price volatility—"electricity prices rose to unheard-of levels" and consumers encountered brownouts and blackouts until the state entered the market in an attempt to fix the problem.[30]

- **Potential reliability degradation.** In the face of uncontrollable weather events, electric utilities currently are subject to the strict oversight of the FPSC and are required to maintain capacity reserves which protects consumers from rolling blackouts if unforeseen

[27]*See* FPSC Electric Restructuring, *supra* note 23, at 29; *supra* note 25.
[28]*See* FPSC 2017 Facts, *supra* note 3, at 4.
[29]As noted by the FPSC previously, "[s]mall-use residential and commercial customers are less likely to have meaningful alternative generation supply choices in a competitive market and may be left paying higher costs." FPSC Electric Restructuring, *supra* note 23, at 29. Higher costs may result in part because those providers that do come to Florida will likely target the highest-paying customers—industrial and large commercial entities— leaving residential and smaller commercial users to fend for themselves.
[30]*See* CBO Report, *supra* note 25, at 1 and 19.

supply shortages occur. In a deregulated market these protections would not necessarily be maintained.

- **Low-income consumers and seniors may be at risk.** For instance, both the New York Public Service Commission and Connecticut State Attorney General's Office have initiated investigations into possible predatory marketing schemes inflicted on low-income consumers by competitive electricity providers.[31]

C. FISCAL IMPACT

The fiscal impacts on state government, incumbent utilities, and their customers are potentially significant. The State of Florida and its local governments rely on revenues received from franchise fees, gross receipts taxes, public service taxes, and sales taxes imposed on electric utilities. There is no doubt that this proposal would cause sweeping structural changes to Florida's electric utility industry. The Constitution Revision Commission ("CRC") should closely examine the effects that those structural changes may have on utility tax revenues.

Those structural changes to Florida's vertically integrated electric utility industry also could result in stranded costs which could have a significant fiscal impact on traditional electric utilities and consumers. Stranded costs are those costs incurred by an electric utility for investment in utility infrastructure pursuant to a government mandate which cannot be recovered in a restructured market. Stranded costs could result in a regulatory taking for which the utility must be compensated. In an attempt to avoid a regulatory taking, customers could be required to reimburse the electric utility for its stranded costs and other losses through the payment of a stranded costs recovery fee. Before adopting Proposal 51, the CRC should take a close look at the fiscal impact that stranded costs could have on customers and electric utilities.

D. CONSTITUTIONAL ISSUES

Implications of Creating Fundamental Rights

However well intended Proposal 51 may be, it carries a number of unintended and potentially expensive consequences that could adversely affect the citizens of this state. The proposal would create a self-executing constitutional right for consumers to pick and choose their electricity provider regardless of whether that choice would undermine the integrity of Florida's Electric Grid or cause rates to increase for other customers. Thus, the proposal could jeopardize the reliability of the grid, create consumer confusion, and cause electricity prices to rise. As explained, those risks are not illusory and in fact have materialized in other states that have experimented with electric industry restructuring.

By hardwiring these problematic provisions in the Florida Constitution, the Florida Legislature could be hamstrung to pass laws to resolve problems should they arise. While the U.S. Constitution is a grant of power to the federal government where no power previously existed,

[31] *See supra* note 26 (on Connecticut); Larry Rulison, *Fed up asking for data, PSC subpoenas energy firms*, Times Union (May 31, 2017), http://www.timesunion.com/7day-business/article/PSC-issues-subpoenas-in-case-against-energy-11184932.php (New York).

a state constitution is a limitation upon the powers of the Florida Legislature.[32] Indeed, the Florida Supreme Court has made it clear that Florida's Constitution provides the basis for limiting the actions of the Legislature.[33]

Of significant concern is the fact that placing the rights granted by Proposal 51 in the state constitution will likely make them fundamental rights, to be defined and enforced by the judiciary.[34] Once interpretation and definition of a fundamental right is given to the judiciary, it is difficult for any corrections or modifications to be made by the political branches. Any legislation viewed as impairing a fundamental right would be strictly scrutinized and would be *presumptively* unconstitutional.[35] Put another way, even if the Legislature tried to legislate around those rights, the legislation would only be valid if it was narrowly tailored to achieve a compelling state interest—a difficult test for any law to satisfy.

The ultimate result would be that the decision-making power over the provision of essential electric service will be transferred from the legislative and executive branches—which have already established an extensive regulatory framework to protect consumers—to the judiciary to decide on a case-by-case basis.

Even for courts, once a body of law is built around these rights, that body of law will be difficult to change because of the doctrine of stare decisis. Stare decisis is the legal doctrine which requires courts to follow precedent—the body of law set forth in earlier court decisions handed down by superior courts that controls what lower courts do. Thus, any problems that arise as a result of Proposal 51 will be nearly impossible for the political branches to fix and very difficult for the judiciary to fix.

Concerns under the U.S. Constitution

Even state constitutional amendments must comply with the U.S. Constitution.[36] Here, Proposal 51 could be subject to challenge under the Contract Clause and the Due Process Clause of the U.S. Constitution.

The Contract Clause

Under the Contract Clause, Art. I, s. 10 of the U.S. Constitution, "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." The Contract Clause also applies to state constitutional amendments.[37]

Florida electric utilities have been urged by the Florida Legislature and the FPSC to enter into territorial agreements to avoid uneconomic duplication of facilities and ensure the reliability of the

[32]*See Peters v. Meeks*, 163 So. 2d 753, 755 (Fla. 1964).
[33]*See Bush v. Holmes,* 919 So. 2d 392, 398 (Fla. 2006).
[34]These would also be brand new fundamental rights as the Florida Supreme Court has previously held that there is no right to electrical service by any particular provider. *See Storey v. Mayo*, 217 So. 2d 304, 307-08 (Fla. 1968).
[35]*See, e.g., Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1245 (Fla. 2017); *State v. J.P.*, 907 So. 2d 1101, 1114 (Fla. 2004).
[36]*See Romer v. Evans*, 517 U.S. 1620 (1996).
[37]*See Fisk v. Police Jury of Jefferson*, 116 U.S. 131, 135 (1885).

grid. Those agreements, which the FPSC has expressly approved, give the respective utilities the exclusive right, and the corresponding obligation, to serve all customers in a particular geographic area. If the consumer choice provisions in Proposal 51 are amended into Florida's Constitution, a utility's right under a territorial agreement to serve all customers in its service area would be eviscerated. Other utility contracts also could be impaired. For example, electric utilities routinely enter into contracts to finance, construct, maintain, and upgrade their electric facilities based on the economic assurance that they have the exclusive right to sell electricity to all customers in a particular area. By eliminating the utility's exclusive right to sell to customers in its service areas, Proposal 51 would destroy the commercial expectations of the parties and substantially impair the utility's obligations and rights under those contracts.

The Due Process Clause

The Fifth Amendment to the U.S. Constitution bars government regulation which limits the use of private property to such a degree that the regulation effectively deprives the owner of property without compensation.[38]

The proposal could substantially devalue and in some instances potentially render useless the generation, transmission, and distribution infrastructure that traditional utilities have invested in to meet their obligation to serve under Florida law. As the U.S. Supreme Court has recognized, the "economic impact of [a] regulation on [a] claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" are highly relevant to the inquiry of whether a regulatory taking has occurred.[39] Amending Proposal 51 into the Florida Constitution could devalue a utility's assets to the extent that there would be an impermissible regulatory taking under the U.S. Constitution.

E. CONCLUSION

Proposal 51 carries significant risks to the reliability of Florida's Electric Grid and consumers. Those risks have materialized in other states that have experimented with electric industry restructuring. The CRC should carefully review the proposal and weigh these considerations—particularly the experience in other states—before moving forward on Proposal 51.

[38]*See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-38 (2005); *Penn Cent. Transp. v. New York City*, 438 U.S. 104 (1978).
[39]*Penn Cent.*, 438 U.S. at 124.

Appendix

Comparison of Residential Electric Prices for 10 Largest States in 2016

Extracted from the EIA Average Price by State by Provider Chart (EIA-961)[40]

Year	State	Industry Sector Category	Average Residential Price (Cents/kilowatt hour)
2016	CA	Total Electric Industry	17.39
2016	TX	Total Electric Industry	10.99
2016	FL	Total Electric Industry	10.98
2016	NY	Total Electric Industry	17.58
2016	IL	Total Electric Industry	12.54
2016	PA	Total Electric Industry	13.86
2016	OH	Total Electric Industry	12.47
2016	GA	Total Electric Industry	11.50
2016	NC	Total Electric Industry	11.03
2016	MI	Total Electric Industry	15.22

[40]The full chart for all states may be found at the following link: https://www.eia.gov/electricity/data/state/avgprice_annual.xlsx. Other detailed state data regarding the electric industry compiled by the EIA may be found here: https://www.eia.gov/electricity/data/state/.